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IN THE

Supreme Court of the United States

October Term, 1967

NO._____

DEWITT EDDIE ROGERS, *Petitioner*

v.

STATE OF OHIO, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

OPINION BELOW.

There have been no official or unofficial reports of the opinions below. An Entry and decision of the Court of Appeals for Franklin County, Ohio, is in the Appendix on pages 1 and 3.

JURISDICTION

The judgment sought to be reviewed was entered by the Supreme Court of Ohio, in its 1967 Term, on May 17, 1967. (Appendix, page 4). A rehearing in the case was denied on June 21, 1967. (Appendix, page 5). On

September 19, 1967, Mr. Justice Stewart extended the time filing this petition herein to and including November 10, 1967.

The statuatory provision believed to confer jurisdiction is 28 U.S. Code, Section 1257 (3), reprinted in the Appendix, page 6.

QUESTIONS PRESENTED

1. Is a search of an automobile unreasonable when it occurs without a warrant, after the accused is under arrest and in custody, and the search occurs 1½ miles from the scene of the arrest approximately ½ hour later?

2. Does the Petitioner waive his right to exclude the fruits of an unreasonable search of his automobile by not filing a pre-trial motion?

3. Was the Petitioner's federal right not given due recognition on the pretext that a legitimate state interest was being served?

THE CONSTITUTIONAL PROVISION

(1) U.S. Constitution, Amendment IV:
"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Facts

Petitioner was convicted in an Ohio Common Pleas Court of armed robbery. The conviction rested in part on the introduction into evidence of a revolver and money seized by the Whitehall, Ohio, police, without a warrant from Petitioner's automobile which police after Petitioner's arrest and a first search of the automobile had impounded and had towed 1½ miles to the Whitehall Police Station. The search occurred approximately one-half to one hour after the Petitioner was in custody of the police. (R-180).

Petitioner appealed his conviction to the Franklin County, Ohio, Court of Appeals which commented, "A search under those circumstances is questionable," but upheld the conviction on the authority of *State* v. *Davis* (1964), 1 Ohio St. 2d. 28, which requires a pre-trial motion seasonably made to suppress evidence.

The record filed in this Court shows that subsequent to the impaneling and swearing of the jury in the trial of Petitioner, a view of the premises was requested by the State of Ohio and allowed by the trial Judge. (R-3). At that time, Petitioner's counsel advised he was filing a motion to suppress certain evidence. (R-5). He then handed the Judge a written motion, attached hereto in Appendix, page 7. The Court then ruled that the written motion

was overruled saying, "The Court feels it is not timely filed; that any objections to any such testimony, except for the purposes suggested by the Court in the *Davis* case, have since been waived. Therefore, if the motion is officially filed with the Clerk, the record may show it's (sic) overruled by the Court for the reasons given." (R-7).

The Supreme Court of the State of Ohio, on May 17, 1967, dismissed Petitioner's appeal sua sponte for the reason that no substantial constitutional question existed and on June 21, 1967, denied a rehearing.

FEDERAL QUESTION RAISED

The Petitioner offered a written motion to the trial Court after the impaneling of the jury, objecting to the supposed introduction of illegally obtained evidence. This written motion asked the suppression of the evidence. (R-7). Petitioner's counsel then informed the Court that the motion to suppress had also been made at a Municipal preliminary hearing. (R-7).

The Petitioner therefore raised the Federal question herein at the earliest opportunity by objections to the evidence in Court. The trial Court overruled the written motion. (R-7).

The Petitioner orally objected to the introduction into evidence of the State's exhibits; to wit: revolver, money and bullets, confiscated during the illegal search of Petitioner's automobile. His objection was overruled. (R-191).

The Petitioner presented the Federal question above to the Court of Appeals for Franklin County, Ohio, in the Bill of Exceptions (record) and brief, again asserting that his Constitutional guarantees were violated. The decision of that Court reflects that they questioned the legality of the search, but felt Petitioner had waived his rights.

The Petitioner then made this issue his major presentation of error to the Supreme Court of Ohio.

REASONS FOR ALLOWANCE OF THE WRIT

Petitioner contends that the decision of the Supreme Court of Ohio, without question affirming the rulings of the Common Pleas Court and Court of Appeals has decided Petitioner's Constitutional guarantee against an unlawful search not in accord with applicable decisions of this Court.

It is clear that searches of motorcars must meet the test of reasonableness under the Fourth Amendment before evidence obtained as a result of such searches is admissible. *Carroll* v. *United States*, 267 U.S. 132 (1925).

Reasonableness fades where a search is remote in time or place from the arrest. The Petitioner was in custody and at another place when the Police of Whitehall searched his automobile. The search was not incident to his arrest. The evidence therefore was inadmissible. *Preston* v. *United States*, 376 U.S. 364 (1964).

Nor is the search of Petitioner's automobile justifiable under the law of the case of *Cooper* v. *California*, _____ U.S. _____ (1967), No. 103-October Term, 1966.

The seizure of Cooper's car occurred because it was required by law. It was seized because of the crime for which Cooper was arrested.

Any evidence acquired as a result of an unreasonable search must be suppressed. *Mapp* v. *Ohio,* 367 U.S. 643 (1961).

The Petitioner did not default on his federal claim that the evidence be suppressed. He presented his motion to the Court after the impaneling of the jury and while they were in recess, preparing for a view of the scene of the crime.

The trial Court waited until the jurors were aside and considered the written motion. No orderly procedure of the Court was being disrupted. It is interesting that the request for a view apparently came shortly before the motion to suppress but did not disturb the Court. (R-5).

The rule in Ohio that an objection to evidence obtained by an unlawful search comes too late where it has been made the first time at the trial; *State* v. *Davis* 1 Ohio St. 2d. 28 (1964), is definitely allowing a State procedural rule to override federal policy. As adopted by the majority of this Court, state-ground rules are respected except where patently evasive of or discriminatory against federal rights or where its procedure make burdensome the vindication of federal rights. *Fay* v. *Noia,* 372 U.S. 391 at 432 (1963).

This Court should weigh the State procedural interest against Petitioner's Constitutional claims.

The State knew that a motion to suppress the illegally obtained evidence was coming. It was made at a Municipal hearing.

An inquiry into whether the procedural rule serves a legitimate state interest and vindicates Petitioner's federal rights must be given utmost attention at the trial Court level. The trial Court in this case loosely applied the pre-trial motion directive. No evidence had been elicited, opening statements were yet to come, in fact, a further recess was taken after the view. In *Davis,* 1 Ohio St. 2d at page 32, the Defendant first objected to the illegal evidence when it was being offered into evidence as exhibits at the conclusion of the State's case. The Ohio Supreme Court said that Defendant waived his right to object to their admission. It is still not clear that in that circumstance there was an intentional relinquishment or abandonment of a known right. *Johnson* v. *Zerbst,* 304 U.S. 458 (1938).

The State of Ohio need not forego insistence on its procedural requirements, but it must not disregard *Fay* v. *Noia,* 372 U.S. 391 (1963).

In a footnote, number three: Mr. Justice Brennan said in *Henry* v. *Mississippi,* 379 U.S. 443 (1965):
"This will not lead inevitably to a plethora of attacks on the application of State procedural rules; where the State rule is a reasonable one and clearly announced to defendant and counsel application of the waiver doctrine will yield the same result as that of the adequate non-federal ground doctrine in the vast majority of cases."

This writer is aware that State procedural rules are necessary and agrees that when clearly announced and reasonable, should be enforced.

After hours of searching, however, one cannot find the rule in *Davis*, clearly announced, except in that case.

Mr. Chief Justice Taft in writing for the majority in the Davis decision bases the pre-trial motion requirement on the fifth paragraph of *Nicholas* v. *City of Cleveland* (1932), 125 Ohio St. 474. Yet that paragraph was specifically overruled by *State* v. *Lindway*, (1936), 131 Ohio St. 166.

Later *State* v. *Lindway*, 'ibid' was unequivocally declared null and void by *Mapp* v. *Ohio*, 376 U.S. 643 (1961), and the double standard in state-federal search and seizure cases was wiped out.

The situation at the time of *State* v. *Davis* was that the Court was relying on an uncodified procedure which had, before *Mapp*, been a moot question.

To clarify, by virtue of *Lindway*, it was futile to file a motion to suppress evidence seized as a result of an illegal search because such motion, no matter when it was presented, would have been overruled. Further, *Lindway*, directly overruled *Nicholas*, which had required a pretrial motion to suppress. Yet the Ohio Court in *Davis*, in light of *Mapp*, resurrected a rule which it had previously overruled and declared it binding procedure.

It is submitted that the status of the procedural requirements in Ohio are such that a complete legislative overhaul should be undertaken.

There is no rule of court to that effect nor a statute in the *Revised Code of Ohio.*

Prior to the present term of Court in Franklin County, Ohio, there were no pre-trial hearings in criminal cases where, as in civil cases, the pre-trial Judge would ask counsel for pre-trial motions.

Giving effect to Ohio's *Davis* case rule for its own sake is indeed forcing resort to an arid ritual of meaningless form. *Staub* v. *City of Baxley,* 355 U.S. 313, 320 (1958).

Insistence on a pre-trial motion does not serve a legitimate state interest.

A trial Court should take many measures to insure that a defendant's rights are protected. The trial Court in Petitioner's case should have asked counsel for preliminary motions to any supposed evidence before calling the jury to their voidire. If this had been done, Petitioner's rights would have been safeguarded and this case avoided.

The State should eschew rigid and technical doctrines of forfeiture, waiver or default. *Case* v. *Nebraska* 381 U.S. 336 (1965).

The proper allocation of power within the federal framework is critical to the administration of justice. Whether the United States Supreme Court should review this State of Ohio case is identical with the question, "Does federal law in this case override the state ground?"

With this question posed, the case of *Parrot* v. *City of Tallahassee,* 387 U.S. 336 (1965) is important.

Defendants in that case had channels open similar to

Ohio, one trial, one appeal, one discretionary review. The discretionary review was filed for but failed because of the lack of a certified transcript from the lower Court.

The decision of the intermediate appellate Court was reversed as the United States Supreme Court felt that federal rights could not be so easily thwarted.

While each state is a laboratory to try novel social and economic experiments, *New State Ice Company* v. *Liebman*, 285 U.S. 262, 280, 311 (1932) (Brandeis, J., dissenting). However, the states' laboratories are not to experiment with the fundamental liberties of the individual citizen, e.g. *Pointer* v. *Texas*, 380 U.S. 400 (1965).

In Petitioner's case, application of the pre-trial objection rule is experimenting with the fundamental rights granted the Petitioner. It is an extension of the ideas of Chief Justice Taft (see 50 AMERICAN BAR ASSOCIATION JOURNAL, 815).

This Court is herein petitioned to admonish the Ohio Court to – as Dean Griswold says in an address, THE STATES AND CRIMINAL LAW, given on May 13, 1965, to the Cleveland Bar Association:

> "For, after all, the basic responsibility for the enforcement of the criminal law remains with the States. The States are, or should be, as much concerned with high standards as is the Federal government. The States should, in my view, welcome the determinations of the Supreme Court that the high standards

prescribed by our Federal Constitution are to be taken seriously and should be enforced. What is needed now is for the States to accept this responsibility, and to adopt means to carry it out. With proper explanation and understanding, this can, I believe, be done without impairing our enforcement of the criminal law. When the States do fully meet this responsibility, we will all be better off, and we will more nearly have realized the potentialities of our Great Federal form of Government."

For the reasons set forth hereinabove, this Petition should be granted.

Respectfully submitted,

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